No. 4,666

United States Circuit Court of Appeals

For The Ninth Circuit

FRANK MILLER, ANTON BRONICH, and JOHN THOMAS,
Plaintiffs-in-Error,

—VS.—

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF PLAINTIFFS IN ERROR

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STATEMENT OF THE CASE

On the 29th day of August, 1924, Federal Prohibition officers at Seattle, in pursuance of a search warrant issued by a Federal commissioner, entered the sole residence of the plaintiffs in error at 139 27th Avenue North, Seattle. and executed said search warrant, arresting the defendant, Frank Miller, who was on the premises, and later obtain-

ing a warrant of arrest for the other plaintiffs in error, Anton Bronich and John Thomas.

After gaining entrance to the residence at the said address under said search warrant, they obtained the possession of 422 gallons of wine and two ounces of distilled spirits which they seized and took into their possession.

In pursuance of said seizure, an information was filed charging the defendants with violations of the National Prohibition Act, Count 1 being for the manufacture, Count 2 for the possession, and Count 3 for the maintenance of a nuisance at said address.

Before plea to the information, the defendants separately petitioned the Court in writing to suppress the evidence so seized on the grounds that the search warrant was void and that it was issued and executed in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and of Title 11 of the Act of Congress of July, 1917, commonly known as the "Espionage Act," and of the Act of Congress of October 28, 1919, commonly known as the "National Prohibition Act" (Trans. Rec. pp. 5, 15, 25).

All the petitions to suppress were denied by the District Court, and exceptions to each ruling were taken and allowed (Trans. Rec. p. 35).

Before the trial of the cause, the defendants orally presented their several petitions to suppress the evidence so unlawfully seized, on the grounds previously specified in the formal petitions filed by the defendants (Trans. Rec. p. 64).

During the trial, the Court, over the objections of the defendants, admitted in evidence Government's Exhibits I, II, and III, said exhibits being portions of the liquor seized under said search warrant; to which ruling the defendants duly saved exceptions (Trans. Rec. p. 72).

After the Government rested, the plaintiffs in error challenged the sufficiency of the evidence on the grounds of a violation of the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States, and further challenged as to Anton Bronich and John Thomas on the grounds that they were not on the premises and it was not a violation of law in the presence of the officers (Trans. Rec. p. 72).

The Court then permitted the Government to reopen and compelled the attorney for defendants to take the witness stand and, over his objections, compelled him to testify as to the signatures of the plaintiffs in error on Exhibits 4, 5, and 7, the same being the signatures of plaintiffs in error to the petitions to suppress the evidence; to which exceptions were allowed (Trans. Rec. pp. 73, 74, 75, 76).

The defendants introduced no evidence and all were convicted, and each received a sentence of a term of six months on each Count 1 and Count 3, terms to run concurrently, and each to pay a fine of $200.00 on Count 2.

On the 6th day of July, 1925, the Court denied the motion of the plaintiffs in error for a new trial,

and all were allowed an exception thereto (Trans. Rec. p. 42).

POINTS

I

The affidavit for the issuance of a search warrant must state facts tending to establish the grounds or probable cause for believing that they exist.

II

No search warrant shall issue to search a private residence, except upon evidence of sale therein.

III

Property seized under an illegal search warrant is not admissible in evidence where timely application is made for its suppression.

IV

No defendant is compelled to give evidence against himself.

SPECIFICATION OF ERRORS

I

The Court erred in denying the petitions to suppress.

II

The Court erred in denying the oral motions to suppress interposed before trial.

III

The Court erred in admitting the liquor in evidence.

IV

The Court erred in denying the challenge to the sufficiency of the evidence.

V

The Court erred in compelling the attorney for the plaintiffs in error to testify against them.

VI

The Court erred in refusing to grant a new trial.

VII

The Court erred in entering judgment and sentences.

ARGUMENT

I

The Affidavit for the Search Warrant Must State Facts Tending to Establish the Grounds or Probable Cause for Believing That They Exist.

The search warrant was void because the affidavit upon which it was issued failed to state any facts upon which the United States Commissioner could base a finding of probable cause for its issuance.

The language of the Fourth Amendment to the Constitution of the United States is as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unlawful searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or

affirmation and particularly describing the place to be searched and the persons or things to be seized."

In accordance with the provisions of the Constitution, Congress has enacted laws governing the issuance of search warrants. Section 3, of the Espionage Act (40 Stat. 228; U. S. Compiled Stat. 1918-1919, Supp. p. 2396) provides:

> "A search warrant cannot be issued but upon probable cause supported by affidavit naming or describing the person and particularly describing the property and place to be searched."

Section 5 provides:

> "The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

Before a search warrant can issue under Section 25, Title 2, of the National Prohibition Act, the informant must show to the Commissioner that the place was being used—

(a) For the unlawful sale of intoxicating liquor, for which cause a private residence may be searched; or

(b) It must be shown that the place to be searched is not a private residence to be used as such, or if a residence, that it is used wholly or in part for some business purpose such as a shop, saloon, restaurant, hotel, or boarding house.

The only portion of the affidavit which need be considered reads as follows:

> "* * * One John Doe Costello, Richard Roe Mareno and Jane Doe Mareno, true names to affiant unknown, proprietors and their employees at 139 27th Avenue North, on the 27th day of August, 1924, and thereafter was and is possessing and selling intoxicating liquor, all for beverage purposes; and that in addition thereto affiant on said date and on previous occasions made an investigation of said premises and smelled the odor of intoxicating liquor, and has seen parties coming from said premises carrying packages which resembled containers of intoxicating liquor all on the premises described as 139 27th Avenue North, Seattle, Washington."

Everything else in the affidavit is formal (Trans. Rec. pp. 22 and 23).

If any facts are stated, they must be found somewhere within the lines above quoted. No evidentiary fact is alleged or circumstance set forth "tending to establish the grounds or probable cause for believing that they exist". It is conceded by the Government at all stages of the proceedings that the premises described is the sole and exclusive residence of the plaintiffs in error, and was used only as such, disconnected from any business purpose whatever. The affidavit states no facts from which the United States Commissioner could determine that probable cause existed for the issuance of a search warrant. There is only the general statement or conclusion of the complainant that the

plaintiffs in error were unlawfully possessing and selling intoxicating liquor, and the additional facts therein do not tend to establish any probable cause to believe that liquor was being unlawfully sold therein.

In *U. S. v. Locknane* (2 Fed. (2nd) 427), and *U. S. v. Ed Hagen* (4 Fed. (2nd) No. 6, p. 801), the words "possessing and selling" are conclusions. The statement that "they smelled the odor of intoxicating liquor and had seen parties coming from the premises carrying packages which resembled containers of intoxicating liquor," are not facts which tend to establish the ground of the application for the search warrant or which tend to show probable cause for believing that liquor was being sold upon the premises. At best, it tends to prove that intoxicating liquor was being manufactured on the premises.

The court below, in deciding the petitions to suppress, held that the affidavit was insufficient (Trans. Rec. p. 35). Therefore, should have held to the rule of *Murby v. U. S.* (293 Fed. 849), wherein they state that the United States Commissioner, District Court, and Circuit Court of Appeals must conform strictly to the Espionage Act, and the affidavit before the Commissioner is the controlling question; and further states "we must enforce the Fourth and Fifth Amendments and statutes intended to protect rights there guaranteed as faithfully as we enforce the Eighteenth Amendment and the National Prohibition Act".

II

No Abandonment of Search Warrant.

The officers testified that, in approaching the premises they smelled the odor of intoxicating liquor. They did not abandon the search warrant and arrest the plaintiff in error Frank Miller for an offense committed in their presence; but proceeded upon the premises, delivered the search warrant to plaintiff in error Frank Miller, and went into the basement and found the liquor (Trans. Rec. p. 66).

They evidently had in mind Section 6 of the Act of Congress of November 23, 1921, which reads as follows:

> "That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000.00 and for a subsequent offense not more than $1,000.00 or imprisoned not more than one year, or both such fine and imprisonment."

In *Murby v. U. S. (Supra)*, the Court, commenting on a similar case, said:

> "Where Federal officers entered a near-beer saloon and announced they were making a search on a warrant, which was invalid, evidence so obtained cannot be admitted because the liquor seized might reasonably be taken without a search warrant where what would have happened or been found if the officers had proceeded without the process is a matter of pure conjecture." (Citing Cases.)

III

Property Seized Under An Illegal Search Warrant Is Not Admissible In Evidence Where Timely Application Is Made for Its Return.

The admission in evidence of property unlawfully seized was a violation of the defendants' rights under the Fifth Amendment to the Constitution of the United States. Following the procedure approved in *Weeks v. U. S.* (232 U. S. 838), *Gould v. U. S.* (255 U. S. 298), and *Amos v. U. S.* (255 U. S. 315), the plaintiffs in error seasonably filed petitions to suppress, setting forth that it was founded solely upon evidence obtained by unlawful search and seizure. The search warrant having been illegally issued and timely motions having been made for the suppression of the property thus seized, it was error to admit the same in evidence over the defendants' objections, and its reception in evidence was a violation of their rights under the Fourth

and Fifth Amendments to the Constitution of the United States.

Gould v. U. S., 255 U. S. 298;
Amos v. U. S., 255 U. S. 315;
Boyd v. U. S., 116 U. S. 616; 29 L. Ed. 746;
Weeks v. U. S., 232 U. S. 383; 28 L. Ed. 642;
Silverthorne Lumber Co. v. U. S., 251 U. S. 285; 64 L. Ed. 319;
Giles v. U. S. (C. C. A.), 284 Fed. 208;
Robenson v. Richardson, 13 Gray (Mass.) 454;
Ganci v. U. S., 287 Fed. 60;
U. S. v. Kaplan, 286 Fed. 963;
Pressley v. U. S., 289 Fed. 477;
Snyder v. U. S., 285 Fed. 1;
Woods v. U. S. (C. C. A.), 279 Fed. 706;
Honeycutt v. U. S. (C. C. A.), 277 Fed. 941;
U. S. v. Bush (D. C.), 269 Fed. 455;
U. S. v. Rykowski (D. C.), 267 Fed. 866;
Veeder v. U. S., 252 Fed. 415;
U. S. v. Locknane, 2 Fed. (2nd) 427;
U. S. v. Ed Hagen, 4 Fed. (2nd) No. 6, 801;
U. S. v. Temperani, 299 Fed. 365;
Murby v. U. S., 293 Fed. 849.

In *Murby v. U. S. (Supra)*, the Court further held,

> "it is settled that evidence obtained by an unconstitutional use of the search warrant is not admissible, and that conviction of crime so obtained must be reversed."

The facts as alleged in the formal petitions to

suppress the evidence were undisputed, to-wit: That the residence at 139 27th Avenue North was the sole and exclusive residence of the plaintiffs in error; that the Government had no evidence whatever that any of the plaintiffs in error had at any time sold any intoxicating liquor thereon; and that they went upon the premises solely and by virtue of the authority of the search warrant previously obtained from the United States Commissioner; that the only evidence that they had was that they had previously smelled the odor of intoxicating liquor and had seen parties coming from said premises carrying packages which resembled containers of intoxicating liquor.

The affidavit for search warrant contained the names of fictitious persons that were living on the premises. They were not the names of the plaintiffs in error. If they saw persons coming from the premises, the presumption would be, and as a matter of fact probably was, the plaintiffs in error. The Government's case is silent as to the identity of such persons.

IV

SEARCH WARRANT CANNOT ISSUE ON PROOF THAT LIQUOR WAS MANUFACTURED IN DWELLING HOUSE:

U. S. v. Jajesweic, 285 Fed. 789;
U. S. v. Kelih, 272 Fed. 484;
Keefe v. Clark, 287 Fed. 372;
Joswich v. U. S. (C. C. A.), 288 Fed. 831;
U. S. v. Palma, 295 Fed. 149;

McDonough v. U. S. (C. C. A.), 299 Fed. 30;
Voorhies v. U. S. (C. C. A.), 299 Fed. 275.

By the weight of authority, the law is well settled that the fact of liquor being manufactured in a private dwelling is not sufficient evidence upon which to predicate the issuance of a search warrant. In *U. S. v. Jajeswiec, (Supra)*, the affidavit of the prohibition officer for the issuance of the search warrant showed probable cause that liquor was being manufactured in the dwelling house of the defendant. The odor of liquor and mash emanated from the premises and a quantity of used mash was visibly present thereon. The Court (Brewster, J.) said *inter alis*:

> "In the National Prohibition Act, Congress undertook to outlaw intoxicating liquor unlawfully possessed, and property designed for the unlawful manufacture of liquor. It expressly authorizes the seizure of such outlaw property upon a search warrant issued as provided in the so-called 'Espionage Act'; but Congress, from a proper regard for the Fourth Amendment, which guarantees the 'right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures,' expressly limited the right to search dwelling houses occupied as such to those being used for the unlawful sale of intoxicating liquor or those in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding

> house. It is contended by the Government that the warrant should lawfully issue as the facts, supported by oath, justified the magistrate issuing the warrant in concluding that there was probable cause to believe that the dwelling was in part used for the business of manufacturing the liquor. To adopt this contention is to extend by implication the right to search dwellings beyond the express limitations of the Act."

Likewise, in *U. S. v. Kelih (Supra)*, the Court held that a private dwelling does not lose its character as such, and become a distillery, because a home-made still is found in operation upon a search.

In *Jozwich v. U. S. (Supra)*, the Circuit Court of Appeals for the Seventh Circuit pointed out that it was apparent that Congress had in mind the distinction that has always existed so far as search is concerned between a dwelling house and a place of business. The Court said:

> "Since the time of Otis, back in the colonial days, the dwelling house, occupied as such, has been recognized as the owner's 'castle' and has not been the legitimate object of raids by Government officers, unless the showing made before the Commissioner disclosed added facts not necessary in case the alleged illegal transaction occurred in a place of business."

In *U. S. v. Palma (Supra)*, the case is on all fours with the case at bar, and the evidence was much stronger and a larger volume of intoxicating liquor

was found in the basement. A prohibition agent, passing the premises (a dwelling), detected a strong odor of distillation coming from the house. Then he went to the premises because of complaints received that liquor was being manufactured, and it was common report that such was the case. The Court (Brewster, J.) said:

> "The private dwelling may be used in part for a 'business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house'—all places where, as the experience of the pre-prohibition days indicates, liquor might be sold; not places where it might be manufactured. Liquors are not manufactured in stores, shops, saloons, restaurants, hotels, or boarding houses. As I read the section, the dominant idea of those who framed it was to permit search of private dwellings only where illegal traffic in liquor was discovered or most likely to be found. By enumerating these places, Congress excluded all others. If it had intended to include the business of a brewery or distillery it could easily have so provided. It cannot seriously be contended that Congress intended to permit the search of private dwellings which were being used in part for any business purpose whatever."

It is exceedingly plain from the entire record that without the property unlawfully seized the Government had no case against the plaintiffs in error.

V

Compelling Defendant to Give Evidence Against Himself.

We think the case at bar on all fours with *State v. O'Hara*, 17 Wash. 526. The opinion (Dunbar, J.) is as follows:

> "The appellant was indicted for the crime of arson, and on trial was convicted and sentenced to the penitentiary. The state offered in evidence some letters and a trespass notice purporting to have been written and signed by the defendant. These were admitted over the objection of the defendant, and were filed as exhibits in the case. After the state had rested, and the defendant was introduced as a witness in his own behalf, upon cross-examination, over his objections, he was compelled to testify that the letters and notices above referred to had been written by him. This is alleged as error by the appellant, and we think it unquestionably was error on the part of the court and was in violation of Section 9 of Article 1 of the Constitution, which provides that no person shall be compelled in any criminal case to give evidence against himself. The state had not been able to identify the handwriting of the defendant, and had it not been for the testimony of the defendant above referred to, the identification could not have been made. The testimony was therefore against the interests of the defendant. This error would be suf-

ficient to reverse this case, for a constitutional right of the defendant has been invaded."

For all the foregoing reasons, we respectfully submit that the judgment should be reversed and the cause remanded with instructions to suppress the evidence and to grant such relief that plaintiffs in error are entitled to.

Respectfully submitted,

FRED C. BROWN,
Attorney for Plaintiffs in Error.